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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 40

MARGARET JOHNSON, as Administratrix of the goods, chattels and credits of CHARLES JOHNSON, deceased,

Petitioner,

v.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD CO.

PETITIONER'S REPLY BRIEF

JACQUIN FRANK,
Counsel for Petitioner.

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HERMAN B. GERRINGER,
on the Brief.

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In essence, respondent contends here (1) that its motion to set aside the verdict was in effect a motion for judgment n.o.v. as well as a motion for a new trial, and (2) that no post-verdict motion for judgment was necessary in view of the trial court's reservation of decision on respondent's motion for a directed verdict.

Answering Point I of Respondent's Brief

Respondent argues that its motion made after the verdict was "intended" to be a motion for judgment or for a new trial and since neither the District Court nor the Court of Appeals nor the petitioner objected to the adequacy of the motion, presumably neither should this Court.

As to the latter point it need only be pointed out that there is not the slightest indication in the record that the District Court interpreted respondent's motion otherwise than it purported to be—a motion to set aside the verdict

(R. 159). Since the motion was denied, we are given no further light on the question of whether that Court considered respondent's motion "adequate" or equivalent to a motion for judgment.

As to the feeling of the Court of Appeals on the adequacy of the motion, the decision of that Court was based either on an erroneous interpretation of the motion as made as a proper motion for judgment pursuant to Rule 50(b) or an erroneous exercise of its power to direct a verdict contrary to the jury's verdict despite the absence of a proper motion for judgment pursuant to the Rule. In either case that is the very point for decision here. It rather begs the question to contend that the lower court cannot be mistaken because it is "presumably familiar with the earlier decisions of this Court."

Finally, as to petitioner's failure to object to the "adequacy" of the motion, it need only be pointed out that the question did not arise until the Court of Appeals' reversal and direction of judgment for the respondent. Since the error occurred at this point it could hardly be pointed out earlier.

On the question of the equivalence of respondent's motion to set aside the verdict to a motion for judgment under Rule 50(b), respondent suggests the interesting idea that that part of its motion which sought to set aside the verdict as contrary to the law and the evidence was equivalent of a motion for judgment. Presumably, the balance of the motion was for a new trial.

The trouble with this argument is that it ignores the essential nature of a motion to set aside a verdict upon errors of law or evidence. On such a motion the trial court considers errors of law committed during the trial. But unless the motion includes a prayer for judgment despite the verdict, the Court is not being asked to consider the possible insufficiency in law of the evidence which would be the only ground for setting aside the verdict and granting judgment notwithstanding the verdict. In the absence of

such motion for judgment, the relief sought and the only relief that can be granted, if there has been error, is the setting aside of the verdict and the ordering of a new trial in which the error can be corrected.

In other words, the trouble with respondent's motion as made, was that it lumps all errors of law, both the fatal and the correctible errors, into one class and thereby prevents the trial court from exercising its judicial discretion in the granting of the applicable relief for each classification of error.

The Rule itself recognizes the distinction between a motion to set aside a verdict and judgment and a motion for judgment. It provides explicitly that within ten days after reception of the verdict, "a party * * * may move to have the verdict and any judgment entered thereon set aside *and* to have judgment entered in accordance with his motion for a directed verdict." (Italics ours.)

Giving this language its plainly intended meaning, it is obvious that a motion to set aside a verdict is not "equivalent" to a motion for judgment n.o.v.

Indeed the cases urged by respondent on this point, *Binder* v. *Commercial Travelers Mut. Acc. Ass'n*, 165 F. 2d 896, and *Gillis* v. *Reicks*, 7 F. R. D. 205, support this plain distinction between the two motions. In the *Binder* case, it appears that there had been no motion for judgment n.o.v. and the motion to set aside the verdict was deemed to constitute a motion for a new trial even though the motion as made did not specifically mention any request for a new trial (although the District Court's order had provided in the alternative for such new trial). In the *Gillis* case the motion was properly made both to set aside the verdict *and* for judgment n.o.v. But since the ground stated for the motion was appropriate only to a new trial, the relief granted was for such new trial.

Answering Point II of Respondent's Brief

Here, respondent argues that the requirement of the Rule for a post-verdict motion for judgment does not apply to the situation where a prior motion made for direction of a verdict has not been decided by the Trial Court, but applies only where such motion has been denied.

To support this proposition respondent ignores the plain language of the Rule itself. The pertinent wording of the first sentence of the Rule is: "Whenever a motion for a directed verdict * * * is denied *or for any reason is not granted,* the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion." (Italics ours.) There follows then the provision for motion to set aside the verdict and for judgment in accordance with the prior motion for directed verdict.

Unless the underlined words above quoted are to be taken as meaningless, the intendment of the Rule is that it applies to a situation where the trial court has reserved decision on the motion for directed verdict as well as to the denial of such motion.

The obvious purpose of the Rule was to give the trial court the opportunity to pass on the legal questions raised by the motion for directed verdict after the jury had passed on the fact questions in the case. This purpose was accomplished by an automatic reservation of decision on the motion made at the close of the evidence. But the moving party is required to elect, after the verdict has come in, whether to move merely to set aside the verdict and for a new trial, or to move also for judgment in accordance with his prior motion for directed verdict, or for both reliefs. The situation has changed qualitatively with the unfavorable verdict as to the moving party and by the nature of his post-verdict motion he gives the trial court (and later on the appellate court) the opportunity to choose the relief, if any, to which he is entitled.

Whether the prior motion for directed verdict was denied or decision thereon reserved (either specifically or

by operation of the Rule) this second opportunity is granted him but, as pointed out in *Montgomery Ward & Co.* v. *Duncan*, 311 U. S. 243, 254, the Rule "* * * regulates the time and manner of moving for direction and of moving for judgment on the basis of the refusal to direct."

As has been pointed out in our main brief and conceded by respondent on page 18 of its brief, the Advisory Committee on the Rules of Civil Procedure in its 1946 Report of Proposed Amendments to the Rules sought an amendment which would do away with the post verdict motion for judgment. In effect respondent's position here is a reiteration of the arguments advanced by the committee.

The proposal was as follows:

> "The making of a motion for judgment in conformity with the motion for a directed verdict shall not be necessary for the purpose of raising on review the question whether the verdict should have been directed or whether judgment in conformity with the motion for a directed verdict should be entered" (Moore's Fed. Pr.—2nd Ed. Vol. 5, pp. 2304-2305).

This Court saw fit to reject that proposal and in the *Cone* case in 1947 made quite clear its position that an appellate court had no authority to order final judgment in accordance with a motion for directed verdict made at the end of the testimony *unless* a post verdict motion for judgment was made in the District Court. It was for the District Court to choose between the two alternatives of entering judgment notwithstanding the verdict or ordering a new trial. And this choice must be based on the motions made after the verdict.

The cases cited by respondent are not very helpful on the point. In every instance, save one, the cases were decided *prior* to the decision in the *Cone* case. Indeed it was to settle the different views in the various circuits that the *Cone* case was decided as it was.

The exception above noted is the *Mullen* case, quoted from at considerable length on pages 9 to 11 of respondent's brief. This is a 1950 district court decision based on *Kline*

v. *Yokom*, 117 F. 2d 370 (C. C. A. 7, 1941) which was decided prior to the *Cone* case. The precedent relied on was overruled by the *Cone* case.

No one is prophet enough to be able to evaluate any and every situation that may arise in the trial of a case where the trial court may find itself impelled to re-evaluate errors made in the reception of evidence—errors that may go to the general and prejudicial conduct in the trial of a case, or insufficiency of evidence.

The winning party should not be placed into a position where he cannot assess the advisability of moving for a new trial in the event of the trial court's disagreement with the jury verdict. If warned in time (by a motion under the rule) the winning party may then ask the trial court to make an alternative order as in the *Montgomery Ward* case. That opportunity is denied the winning party when for the first time the reviewing court orders a judgment against him which forecloses any further rights. The rule has provided for orderly procedure. In the long run compliance with the provisions of the rule will lead to less confusion than the emasculation of or whittling down by strained interpretation, the fair intendment of the rule.

The extent of the power of the courts of appeal to order either a direction of judgment or a new trial under the circumstances set forth in Rule 50(b) has been clearly set forth in the *Cone* case and *Globe Liquor Co.* case. The rule is clearly applicable to the case at bar. The lower court by ordering direction of verdict for respondent despite its failure to move for judgment notwithstanding the verdict was in error and the judgment should be reversed.

Respectfully submitted,

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